STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 28, 2014
v	No. 314868 Wayne Circuit Court
GREGG ALAN KAITNER, Defendant-Appellant.	LC No. 12-004656-FH

Before: SAWYER, P.J., and METER and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of third-degree criminal sexual conduct, MCL 750.520d(1)(c) (sexual penetration with knowledge or with reason to know that the victim was physically helpless). The trial court sentenced him to 1 to 15 years' imprisonment. We affirm.

Defendant argues that his rights to a fair trial and to present a defense were violated when the trial court refused to provide a jury instruction regarding the victim's alleged consent. Specifically, defendant argues that because there was sufficient evidence to show consent, the trial court was required to provide a requested instruction on consent. We disagree.

"Claims of instructional error are generally reviewed de novo by this Court, but the trial court's determination that a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion." *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007). An abuse of discretion occurs "when the trial court chooses an outcome falling outside the range of principled outcomes." *People v Kosik*, 303 Mich App 146, 154; 841 NW2d 906 (2013). Reversal is warranted only where the error undermined the reliability of the verdict. *People v Hawthorne*, 474 Mich 174, 184-185; 713 NW2d 724 (2006).

Generally, trial courts are required to provide juries with instructions that include all of the elements of a crime charged and any material issues, defenses, or theories for which there is supporting evidence on the record. *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). An appellate court reviews jury instructions as a whole, rather than as individual parts. *People v Kowalski*, 489 Mich 488, 501; 803 NW2d 200 (2011).

A person is guilty of third-degree criminal sexual conduct "if the person engages in sexual penetration with another person" and one of the required statutory circumstances exist.

MCL 750.520d(1). For example, a person is guilty of third-degree criminal sexual conduct if he or she engages in sexual penetration with another person and force or coercion is used to accomplish the sexual penetration. *People v Carlson*, 466 Mich 130, 131-132; 644 NW2d 704 (2002), citing MCL 750.520d(1)(b). "In the context of the [criminal sexual conduct] statutes, consent can be utilized as a defense to negate the elements of force or coercion." *People v Waltonen*, 272 Mich App 678, 689; 728 NW2d 881 (2006). However, a person is also guilty of third-degree criminal sexual conduct if he or she engages in sexual penetration with another person and the actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless. MCL 750.520d(1)(c).

CJI2d 20.27 is the jury instruction regarding consent as a defense to sexual crimes. The use note for CJI2d 20.27 states that the instruction "should be given only where there is evidence of consent. It is also obviously inappropriate where the victim is mentally disabled, physically helpless, or below the age of consent." CJI2d 20.16 is the jury instruction regarding a complainant in a sex case that is mentally incapable, mentally incapacitated, or physically helpless. In the context of a physically helpless complainant, the instruction states that "physically helpless means that [*name* complainant] was unconscious, asleep, or physically unable to communicate that [he / she] did not want to take part in the alleged act." CJI2d 20.16.

Here, defense counsel requested CJI2d 20.27, but the court instead read the following:

> If under all of the facts and circumstances of this case you find that the Defendant reasonably made a mistake of fact regarding the complainant's physical condition you must find the Defendant not guilty.
>
> You must evaluate the facts and circumstances of this case as to whether a reasonable person would know or have reason to know that a complainant was physically helpless due to intoxication. . . .
>
> Physically helpless means that [the complainant] was unconscious, asleep or physically unable to communicate that she didn't want to take part in the alleged act.

Defendant argues that the trial court should have read CJI2d 20.27 because defendant's theory of the case was that the victim had initiated and consented to the alleged sexual act. However, defendant's argument is not congruent. There were two accounts provided at trial that dealt with this theory: the summary of defendant's statement to the police, and Cynthia Stempien's testimony regarding defendant's statements after the incident. However, if those accounts were accepted as fact, the incident would not actually satisfy the elements of third-degree criminal sexual conduct. Third-degree criminal sexual conduct requires sexual penetration; however, the testimony that suggested the victim initiated the sexual conduct did not indicate that any sexual penetration actually occurred. Accordingly, if the jury were to accept the asserted theory that the victim initiated and consented to sexual contact, it also must conclude that no sexual penetration occurred and thus acquit defendant of the only charge he faced. If defendant admitted there was sexual penetration, but alleged that the victim consented to it, CJI2d 20.27 may have been appropriate. However, defendant argued that there was no sexual

penetration that the victim could have consented to. Under the circumstances, the trial court's refusal to read CJI2d 20.27 was appropriate.

Defendant argues that *People v Thompson*, 117 Mich App 522, 525-526; 324 NW2d 22 (1982), supports the assertion that the trial court should have read CJI2d 20.27. While this Court in *Thompson* did hold that a jury instruction on consent was required in a first-degree criminal sexual conduct case, the defendant in that case admitted that sexual intercourse had occurred. See *id*. at 526. In contrast, the evidence in this case supports only one of two conclusions: that sexual penetration occurred and the victim was physically helpless at the time, or the victim initiated and consented to sexual contact but sexual penetration did not occur. Because defendant does not admit that sexual penetration took place in this case, *Thompson* is factually distinguishable.

Defendant next argues that his right to present a defense was violated when the trial court disallowed Corey Kaitner's testimony about statements made by another person. Defendant argues that the testimony should have been admitted as evidence of the declarant's state of mind or admitted under the "catch-all" exception to the hearsay rule. We disagree.

"A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion." *People v Brown*, 294 Mich App 377, 385; 811 NW2d 531 (2011).

"Generally, hearsay evidence is inadmissible unless it qualifies as an exception to the hearsay rule." *People v Malone*, 445 Mich 369, 399; 518 NW2d 418 (1994), citing MRE 802. Hearsay is defined as "'a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.'" *Malone*, 445 Mich at 399, quoting MRE 801(c). Numerous exceptions to the hearsay rule exist, but those exceptions "are justified by the belief that the hearsay statements are both necessary and inherently trustworthy." *Malone*, 445 Mich at 400 (internal citation and quotation marks omitted; emphasis removed).

MRE 803(3) is the exception to the hearsay rule for statements concerning a declarant's "'[t]hen existing mental, emotional, or physical condition.'" *People v Moorer*, 262 Mich App 64, 68; 683 NW2d 736 (2004), quoting MRE 803(3). "Statements of mental, emotional, and physical condition, offered to prove the truth of the statements, have generally been recognized as an exception to the hearsay rule because special reliability is provided by the spontaneous quality of the declarations when the declarations describe a condition presently existing at the time of the statement." *Moorer*, 262 Mich App at 68-69.

MRE 803(24) is the catch-all exception to the hearsay rule. MRE 803(24) provides that the following is not excluded by the hearsay rule, even though the declarant is available as a witness:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the

> general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. . . .

Accordingly, evidence offered under MRE 803(24) must satisfy four elements to be admissible: "(1) it must have circumstantial guarantees of trustworthiness equal to the categorical exceptions, (2) it must tend to establish a material fact, (3) it must be the most probative evidence on that fact that the offering party could produce through reasonable efforts, and (4) its admission must serve the interests of justice." *People v Katt*, 468 Mich 272, 279; 662 NW2d 12 (2003).

Defendant argues that Corey Kaitner should have been allowed to testify that "Mike" had asked Corey numerous times to come to Mike's home so that Mike would not have to be alone with the victim. Defense counsel attempted to elicit from Corey that Mike was concerned that the victim would levy false accusations of sexual abuse against him. The implication, although specific examples were never provided, was that the victim had previously made false allegations of sexual abuse. At trial, the prosecution objected on hearsay grounds, and defense counsel argued that "it's one of those things that may be relevant under the extra statute that permits sometimes an important issue to be presented." The trial court sustained the prosecution's objection. Although it is unclear exactly what hearsay exception defense counsel argued at trial, the testimony did not fall under either MRE 803(3), the state-of-mind exception, or MRE 803(24), the catch-all exception.

Regarding the state-of-mind exception, the testimony did not consist of statements of mental or physical condition offered to prove the truth of the statement. Defense counsel did not attempt to highlight any spontaneous quality of Mike's statements or show whether they involved a condition existing at the time they were made. Rather, the statements involved Mike's generalized fear that the victim would make false allegations of sexual abuse toward him. There was no evidence to suggest that Mike's statements were statements regarding his then-existing mental or physical condition. The MRE 803(3) exception did not apply.

Regarding the catch-all exception, there was nothing to indicate that the statements were particularly trustworthy. We note that Corey was disabled and lived with defendant and therefore arguably had a reason to support him. Moreover, we note that aside from Corey's testimony,[1] there was no evidence presented at trial to suggest that the victim had ever made formal complaints of sexual abuse in the past, nor was there any reason provided for why Mike was not personally present to testify. Rather, Corey's proffered testimony was essentially a bare assertion unsupported by any other evidence presented at trial. Regarding the second element of MRE 803(24), the evidence did tend to establish a material fact. Evidence of past false allegations of sexual abuse would be relevant for the jury in the consideration of whether the victim was a credible witness. However, we cannot conclude that the evidence was the most probative evidence on that fact that the offering party could produce through reasonable efforts. As noted, defendant did not explain why Mike did not personally testify regarding his prior statements. Further, defense counsel did not ask the victim, during cross-examination, whether

[1] Corey was allowed to testify that the victim was untrustworthy and had "made a claim like this before."

she had ever made past allegations of sexual abuse. Additionally, no other evidence was provided that the victim had ever filed any kind of formal complaint regarding sexual abuse. Finally, regarding the fourth element of MRE 803(24), admission of the evidence would not have been in the interests of justice, given the considerations above and especially given that Corey did in fact testify that the victim was untrustworthy and had "made a claim like this before." The trial court did not abuse its discretion when it excluded the testimony in question.[2]

Defendant also argues that the trial court's exclusion of Corey's testimony violated his right to present a defense. It is well-settled that a criminal defendant has a state and federal constitutional right to present a defense. *People v Unger*, 278 Mich App 210, 249-250; 749 NW2d 272 (2008). However, the right to present a defense is not absolute. *Id*. at 250. Rather, "states have been traditionally afforded the power . . . to establish and implement their own criminal trial rules and procedures." *Id*. Generally, rules of criminal procedure are valid as long as they are not arbitrary or disproportionate to the purposes they are designed to serve. *Id*. Defendant's assertion that "evidentiary rules must yield when they collide with a criminal defendant's constitutionally protected right to present a defense" is unpersuasive. Defendant did, in fact, present a defense at trial; he argued that no sexual penetration occurred. Defendant has not alleged that the Michigan Rules of Evidence regarding the exclusion of hearsay evidence are arbitrary or disproportionate to the purposes they are designed to serve. Reversal is unwarranted.

Defendant next argues that the trial court erred when it refused defense counsel's request to instruct the jury on fourth-degree criminal sexual conduct as a lesser included offense of third-degree criminal sexual conduct. Specifically, defendant argues that fourth-degree criminal sexual conduct is a necessarily included lesser offense of third-degree criminal sexual conduct because the elements of each offense are the same except that the third-degree offense requires penetration, while the fourth-degree offense requires only contact. Further, defendant contends that the evidence presented at trial supported the requested instruction because defendant was unaware that the victim was intoxicated, and although he admitted there was sexual contact, he argued there had been no penetration.

"[A] requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002), overruled in part on other grounds by *People v Mendoza*, 468 Mich 527; 664 NW2d 685 (2003). Only *necessarily* included lesser offenses may be submitted in addition to the charged offense. *People v Nyx*, 479 Mich 112, 117-118, 121; 734 NW2d 548 (2007) (opinion of TAYLOR, J.). The distinction between a necessarily included lesser offense and a cognate lesser offense is that a cognate lesser offense "shares elements with the charged offense but contains at least one element not found in the higher offense." *Id*. at 118 n 14. For example, the Michigan Supreme Court has held that second-degree criminal sexual conduct is a cognate lesser offense of first-degree criminal sexual conduct because the second-

[2] Defendant also mentions Corey's possible testimony about the victim's alleged stealing, but he does not elaborate upon this argument on appeal and we therefore do not address it.

degree offense requires proof of an intent not required by the first-degree offense, that is, the defendant must intend to seek sexual arousal or sexual gratification. *Id.*, citing *People v Lemons*, 454 Mich 234, 253-254; 562 NW2d 447 (1997). A necessarily included lesser offense only qualifies as such if all the elements of the lesser offense are included within the greater offense. *Nyx*, 479 Mich at 121.

Although fourth-degree criminal sexual conduct is a cognate lesser offense of third-degree criminal sexual conduct, it is not a necessarily included lesser offense. A person is guilty of fourth-degree criminal sexual conduct if he or she engages in sexual contact with another person, and, among other alternative circumstances, the actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless. MCL 750.520e(1)(c). A person is guilty of third-degree criminal sexual conduct if he or she engages in sexual penetration with another person, and, among other alternative circumstances, the actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless. MCL 750.520d(1)(c). Accordingly, fourth-degree criminal sexual conduct would be a necessarily included lesser offense of third-degree criminal sexual conduct if it is impossible to engage in sexual penetration with another person without also engaging in sexual contact with that person. As defined in MCL 750.520a(q), sexual contact "includes the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for . . . [r]evenge . . ., [t]o inflict humiliation . . ., [or] [o]ut of anger." As defined by MCL 750.520a(r), sexual penetration "means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body . . . ." As the explicit language of the statute denotes, sexual contact specifically requires intent. MCL 750.520a(q). Conversely, sexual penetration does not require any form of intent; only the act of penetration is considered. MCL 750.520a(r). Therefore, sexual contact and sexual penetration are independent elements, each of which is not contained in the other offense. Fourth-degree criminal sexual conduct is not a necessarily included lesser offense of third-degree criminal sexual conduct, and we find no basis for reversal. See, generally, *Lemons*, 454 Mich at 253-254.[3]

Defendant next argues that his right to a fair trial was violated when the prosecution stated during its closing argument that if the jury believed defendant's statements to police, it had

[3]As defendant points out in his brief on appeal, this Court did find in *People v Thompson*, 76 Mich App 705, 708; 257 NW2d 268 (1977), that "[o]bviously, if there is penetration there is contact." However, because *Thompson* was decided before November 1, 1990, it is not binding on this Court. MCR 7.215(J)(1). Further, the Court in *Thompson* did not consider the distinction noted in the statute between the intent required for sexual contact and the lack of intent associated with sexual penetration.

"a bridge to sell you." Defendant contends that the prosecution impermissibly attempted to mislead the jury. We disagree.

To preserve the issue for appellate review, a defendant must object to an alleged instance of prosecutorial misconduct. *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). This Court is precluded from reviewing unpreserved claims of prosecutorial misconduct unless an objection at trial could not have cured the error or failure to review the claim would result in a miscarriage of justice. *Unger*, 278 Mich App at 234-235. Here, defendant's counsel failed to object during the prosecutor's closing argument. Accordingly, this issue is not preserved and is subject to plain-error review; to avoid forfeiture of the claim, defendant must show that: (1) error occurred, (2) the error was clear or obvious, and (3) the plain error affected substantial rights, i.e., the error affected the outcome of the lower court proceedings. *People v Wyngaard*, 462 Mich 659, 668; 614 NW2d 143 (2000).

The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *Dobek*, 274 Mich App at 63. Courts make determinations of prosecutorial misconduct on a case-by-case basis. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). Comments made by a prosecutor must be evaluated in the context of a defendant's arguments and the relationship they bear to the evidence admitted at trial. *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005). A prosecutor may not vouch for the credibility of a witness with the implication that the prosecutor has special knowledge of the truthfulness of that witness. *People v Seals*, 285 Mich App 1, 22; 776 NW2d 314 (2009). Additionally, "the prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury." *People v Fyda*, 288 Mich App 446, 461; 793 NW2d 712 (2010). However, a prosecutor may argue that the defendant or a witness is not worthy of belief. *Dobek*, 274 Mich App at 67.

Here, during closing arguments, the prosecutor stated:

> So for [defendant] to say he didn't know that [the victim] was intoxicated, if you believe that, well, what's the saying? I have a bridge to sell you. It leads from[] the Detroit River bank over to Windsor because it's ridiculous. Use your common sense here.

Taking the comments as a whole and in the context of defendant's arguments, the comments were merely an attempt to persuade the jury that defendant's statements to police were not credible. Defendant's statements to police included that he did not know the victim was intoxicated at the time of the alleged sexual abuse; however, the victim testified that she had been drinking from morning until night on that day. Defendant does not argue how the prosecutor's comments suggested that she had any special knowledge about the truthfulness of defendant's statements. Rather, the comments went more towards the suggestion that defendant's statements conflicted with the other evidence presented in the case. We find no plain error.

Defendant next argues that the trial court erred when it sentenced defendant within the sentencing guidelines. Specifically, defendant argues that because, among other reasons, this was his first felony conviction and he owns a small business, the trial court should have departed from the sentencing guidelines and sentenced defendant to less than one year of imprisonment.

"[A] sentence that is outside the appropriate guidelines sentence range, for whatever reason, is appealable regardless of whether the issue was raised at sentencing, in a motion for resentencing, or in a motion to remand." *People v Kimble*, 470 Mich 305, 310; 684 NW2d 669 (2004). "However, if the sentence is within the appropriate guidelines sentence range, it is only appealable if there was a scoring error or inaccurate information was relied upon in determining the sentence and the issue was raised at sentencing, in a motion for resentencing, or in a motion to remand." *Id.* at 310-311. Here, defendant did not argue that there was a scoring or information error at sentencing, nor did he make any post-trial motions to correct any alleged errors. Accordingly, the sentence is not appealable.

Affirmed.

/s/ David H. Sawyer
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood